

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

Lorenzo P. Oliveros, Appellant,

v.

**Office of Personnel Management, Agency
(CSA 3 230 533).**

Docket Number SE08319110122

Date: July 24, 1991

Lorenzo P. Oliveros, pro se.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the initial decision issued on March 15, 1991, that sustained the reconsideration decision of the Office of Personnel Management (OPM) denying his application for an annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, we GRANT the petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING OPM's reconsideration decision. See 5 C.F.R. § 1201.117.

BACKGROUND

The appellant applied for a deferred annuity under the CSRS for service with the Philippine government from May 18, 1926, to May 31, 1927, and from June

21, 1930, to October 10, 1945.¹ See Initial Appeal File (IAF), Tab 4(5). OPM was unable to verify the claimed employment either through its own records or through the National Personnel Records Center. In a reconsideration decision issued November 5, 1990, OPM found that, while service with the Insular Government of the Philippine Islands prior to November 14, 1935, was creditable,² no benefits attached since the appellant was never employed in a position subject to civil service retirement coverage.

In an initial decision based on the documentary record, the administrative judge found that: (1) The appellant bore the burden of proving his entitlement to an annuity by the preponderance of the evidence; and (2) to qualify for an annuity, the appellant must have completed at least 5 years of creditable service and must have served at least 1 of his last 2 years of Federal service in a covered position under 5 U.S.C. § 8333(a)-(b). The administrative judge also found that, while the appellant's employment prior to November 15, 1935, exceeded 5 years of creditable service, the appellant had not been employed in a covered position for a minimum of 1 year within the 2-year period prior to his separation from Federal employment.

In his petition for review, the appellant contends, in pertinent part, that the "1 out of 2 years of covered service rule" did not apply until 1954, and therefore did not affect his eligibility for an annuity based on service before 1935. OPM has not responded to the petition.

ANALYSIS

The Civil Service Retirement Act (CSRA) currently requires that an employee complete at least five years of creditable service, and must have served at least one of the last two years of Federal service in a covered position. See 5 U.S.C. § 8333(a)-(b). Under section 8333(b), which was enacted on August 31, 1954, however, a failure to meet the covered service³ requirement "does not deprive the individual or his survivors of annuity rights which attached

¹ The appellant had additional service with the Philippine Government from July 1, 1946 to August 2, 1963. See Agency File, Tab 6. This service, however, is not creditable.

² See *Untalan v. Office of Personnel Management*, 30 M.S.P.R. 297, 299 n. 2 (1986).

³ In *Noveloso v. Office of Personnel Management*, 45 M.S.P.R. 321, 323-24 (1990), *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (Table), the Board addressed the distinction between creditable service and covered service. We held that, although all Federal service was creditable, only service that was "subject to" the CSRA was covered. *Id.* at 323-24. Covered employees "must deposit part of their basic pay into the Civil Service and Disability Fund." *Id.* at 323.

on a previous separation.” The law in 1935, which applies here,⁴ required at least 15 years of creditable service and was limited to permanent competitive employees in covered positions. See Civil Service Retirement Act of May 29, 1930, Ch. 349, §§ 1, 3, and 7, 46 Stat. 468, 468, 470, and 474.

As OPM found, only pre-1935 service with the Philippine Islands Insular Government is creditable service. See Federal Personnel Manual Supplement 831-1, Appendix C-4, Footnote 25. When the appellant ceased to be a Federal employee in November 1935, however, he had not completed the required 15 years of service, nor attained age 45⁵ to be eligible for a deferred annuity. See CSRA of 1930, §§ 1 and 7. Hence, he did not have any vested annuity rights based upon the law then in effect.

Further, the appellant has not provided evidence showing that any of his appointments prior to November 15, 1935, were to positions covered under the CSRA. The absence of an official appointment to a covered position renders the appellant ineligible for retirement benefits. See *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1579-80 (Fed.Cir.), *cert denied*, 484 U.S. 913 (1987).

The eligibility requirement for retirement is a substantive legal requirement and allows for no administrative discretion by OPM or the Board. See *Graef v. Office of Personnel Management*, 23 M.S.P.R. 676, 678 (1984); *Shelley v. Office of Personnel Management*, 6 M.S.P.R. 267 (1981). The appellant bears the burden of showing his entitlement to the benefit sought. See *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *Huskey v. Office of Personnel Management*, 27 M.S.P.R. 363, 365 (1985), *aff'd*, 790 F.2d 92 (Fed. Cir. 1986) (Table). Because the appellant has failed to prove that he is entitled to an annuity under the applicable law, the administrative judge's erroneous application of the 1 out of 2 rule under 5 U.S.C. § 8333(b) to service before 1935 did not prejudice his substantive rights. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

⁴ See CSRA of 1930, Ch. 349, effective July 1, 1930. The Act of Jan. 24, 1942, Ch. 16, § 5, 56 Stat. 13, 16, granted annuity rights to covered employees who had completed five years of creditable service.

⁵ The appellant was born on August 24, 1904. See Agency File, Tab 5 (Application for Deferred Retirement).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.